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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                   DANIEL YOUNG, et al.,

CASE NO. C18-1007JLR-MLP

11                   Plaintiffs,

ORDER ADOPTING IN PART  
12                   v.  
13                   PATRICK E. PENA, et al.,  
14                   Defendants.

AND REJECTING IN PART  
REPORT AND  
RECOMMENDATION

15                   **I. INTRODUCTION**

16         This matter comes before the court on the report and recommendation of United  
17         States Magistrate Judge Michelle L. Peterson (R&R (Dkt. # 50)) and Defendants Patrick  
18         Pena, Nicolas Sturlaugson, Travis Hauri, David Johnson, and City of Bellingham's  
19         (collectively, "Defendants") objections thereto (Obj. (Dkt. # 52)). Plaintiffs Daniel  
20         Young<sup>1</sup> and Richard Young (collectively, "Plaintiffs") did not file objections or a

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<sup>1</sup> Since the time of the events at issue, Daniel Young became known as Katherine Wren Katzenjammer. The court refers to Ms. Katzenjammer by her chosen name unless it is necessary

1 response to Defendants' objections. (*See* Dkt.) Having carefully reviewed the foregoing,  
2 the relevant portions of the record, and the applicable law, the court ADOPTS in part and  
3 REJECTS in part the report and recommendation.

4 **II. BACKGROUND**

5 In June 2016, Mr. Young, a 65-year-old First Nations man, was renting a  
6 two-bedroom apartment in Bellingham, Washington. (Young Decl. (Dkt. # 35) ¶¶ 2-3,  
7 9.) Mr. Young had three roommates at the time, although only one of his roommates was  
8 identified on the lease. (*Id.* ¶¶ 10-19.) According to Mr. Young, each of his roommates  
9 went by numerous false names. (*Id.* ¶¶ 12, 15-16, 17.) Mr. Young's longtime  
10 acquaintance, Heather (who was identified by a false name on the lease), Heather's  
11 daughter, Ashley (who was going by the name "Isabella Petrova"), and Ashley's brother  
12 (or boyfriend), Andrew Albers, were all living in the apartment with Mr. Young. (*Id.*)  
13 On June 2, 2016, Mr. Young's daughter, Ms. Katzenjammer, visited Mr. Young at the  
14 apartment, but she did not live there. (*Id.* at ¶¶ 25, 30.)

15 Defendants Patrick Pena and Nicolas Sturlaugson, who are both City of  
16 Bellingham Police Officers, were on patrol in the same vehicle when they responded to a  
17 911 call around 9:15 p.m. that evening. (12/3/18 Sturlaugson Decl. (Dkt. # 12) ¶ 3; Pena  
18 Decl. (Dkt. # 13) ¶ 3.) A woman who identified herself to the 911 dispatcher and police  
19 officers as Isabella Petrova reported that "Daniel" (Ms. Katzenjammer) was drunk and  
20 starting fights at her apartment. (12/3/18 Sturlaugson Decl. ¶ 3, Ex. A ("CAD Report").)

21 \_\_\_\_\_  
22 to accurately quote statements from the record. Further, the court's references to "Mr. Young"  
refer to Richard Young, not Daniel Young.

1 She further reported that Ms. Katzenjammer was groping her and her friends, had broken  
2 a glass, and was laying on the ground screaming. (12/3/18 Sturlaugson Decl. ¶ 4.) Ms.  
3 Petrova waited outside with a friend for the officers to arrive. (*Id.* ¶¶ 4-5.)

4 When Officers Pena and Sturlaugson arrived at the apartment complex, they  
5 contacted Ms. Petrova in the parking lot. (*Id.* ¶ 4.) She once again reported that Ms.  
6 Katzenjammer was inside the apartment with Mr. Young. (*Id.* ¶ 5.) Ms. Petrova  
7 identified Mr. Young to the officers as her uncle, although they are not related. (*Id.*) She  
8 again reported that Ms. Katzenjammer was intoxicated and had groped her and her friend.  
9 (*Id.*) Ms. Petrova reported that she lives at the apartment with her brother and Mr.  
10 Young, and asked the officers to remove Ms. Katzenjammer. (*Id.*; Pena Decl. ¶ 4.)

11 Ms. Petrova then walked Officers Pena and Sturlaugson to the apartment and let  
12 them in. (4/26/19 Sturlaugson Decl. (Dkt. # 42) ¶ 8, Ex. A (“Video Recording”).) When  
13 they entered the apartment, Mr. Young was sitting upright on a couch in the living room.  
14 (*Id.*) Ms. Katzenjammer was kneeling on the living room floor to the right of the  
15 officers. (*Id.*) Officer Pena immediately stated, “[h]ey guys” and “[a]re you Daniel?” as  
16 he looked at Ms. Katzenjammer. (*Id.*) Officer Pena told Ms. Katzenjammer the reason  
17 the officers were there and explained, “if you are Daniel, we are just here to ask you to  
18 leave.” (*Id.*) He told Ms. Katzenjammer that “other people that live here” and that  
19 “apparently you’ve been causing a ruckus, you are too drunk they want you out.” (*Id.*)  
20 Officer Pena asked Ms. Katzenjammer to come outside to talk. (*Id.*)

21 At this point, Mr. Young and Ms. Katzenjammer began questioning the officers as  
22 to who wanted Ms. Katzenjammer to leave the apartment. (*Id.*) Ms. Petrova responded,

1 “[r]ight here.” (*Id.*) Officer Pena then asked if Ms. Katzenjammer wanted to speak  
2 outside, at which point Mr. Young stood up and walked quickly towards Officer Pena  
3 saying “[s]ure, I want to talk to this human being.” (*Id.*) When the officers informed Mr.  
4 Young that they did not need to talk to him and he could sit down, Mr. Young said, “you  
5 don’t?” and then raised his arms and reached towards Officer Pena’s chest or collar. (*Id.*)  
6 In the video, Mr. Young appears intoxicated and hostile. (*Id.*)

7 Officer Pena then pushed Mr. Young away, forcing Mr. Young back a few feet,  
8 and issued verbal warnings to stop or Mr. Young could be tased. (*Id.*) After a short  
9 pause, Mr. Young again took several steps towards Officer Pena. (*Id.*) Officer  
10 Sturlaugson then deployed his taser in “dart mode.” (*Id.*) The taser prongs impacted Mr.  
11 Young in his thigh, causing him to fall backwards abruptly, close to where Ms.  
12 Katzenjammer was still kneeling on the floor. (*Id.*) Taser records reflect that the taser  
13 cycled one time for five seconds. (Starkovich Decl. (Dkt. # 15) ¶¶ 6-7, Ex. A.) Mr.  
14 Young remained on the ground after being tased, but continued to argue with the officers.  
15 (Video Recording.)

16 The parties have different versions of what happened next between Ms.  
17 Katzenjammer and the officers, and the video does not resolve the factual dispute because  
18 only Ms. Katzenjammer’s torso and above are visible. (*Id.*) Officers Pena and  
19 Sturlaugson assert that Mr. Young was lying on the ground with the taser wires from  
20 Officer Sturlaugson’s taser still extending from the probes attached to his leg. (12/3/18  
21 Sturlaugson Decl. ¶ 9; Pena Decl. ¶ 8.) After Ms. Katzenjammer told the officers that  
22 Mr. Young had a serious medical condition, Officer Sturlaugson said, “we aren’t trying to

1 hurt him, but he can't hurt us." (Video Recording.) By this point, Officer Pena drew his  
2 taser and told Ms. Katzenjammer to "sit down, get away." (*Id.*) Defendants claim that,  
3 after the taser cycle was complete, Ms. Katzenjammer attempted to break the wires  
4 connecting Officer Sturlaugson's taser to the probes in Mr. Young's thigh. (12/3/18  
5 Sturlaugson Decl. ¶ 9; Pena Decl. ¶ 8.) Officer Sturlaugson asserts that he was concerned  
6 that if the taser wires were broken, he would lose the ability to control Mr. Young if he  
7 became violent. (12/3/18 Sturlaugson Decl. ¶ 8.) In addition, Officer Pena asserts that  
8 his path to Ms. Katzenjammer was obstructed by Mr. Young's body, the taser wires from  
9 Officer Sturlaugson's taser, and a coffee table. (Pena Decl. ¶ 8.)

10       In contrast, Ms. Katzenjammer claims that she did not touch the taser wires  
11 attached to Mr. Young, and remained kneeling on the floor. (Katzenjammer Decl. (Dkt.  
12 # 36) ¶ 81.) In the video recording, Officer Pena does not explicitly mention the taser  
13 wires in his instructions to Ms. Katzenjammer, but continues to warn her that if she does  
14 not sit back on the couch, she will get tased. (Video Recording.) Ms. Katzenjammer  
15 appears intoxicated and defiant, and is non-compliant with Officer Pena's directive. (*Id.*)  
16 The video, however, does not show Ms. Katzenjammer's hands, or whether she was  
17 attempting to remove the taser wires from her father's thigh. (*Id.*)

18       After Ms. Katzenjammer failed to comply with Officer Pena's repeated orders,  
19 Officer Pena warned, "you're going to get tased, you're going to get tased." (Video  
20 Recording.) Ms. Katzenjammer responded, "[y]ou can tase the fuck out of me and I will  
21 make weird things happen for your life." (*Id.*; Pena Decl. ¶ 9.) Officer Pena then said,  
22 "you need to get back and sit on the couch," to which Ms. Katzenjammer responded,

1     “no.” (Video Recording.) Officer Pena then deployed his taser in dart mode at Ms.  
2     Katzenjammer. (Pena Decl. ¶ 11.)

3                 According to the video, the taser did not appear to incapacitate Ms. Katzenjammer  
4     at first because she began wrapping the taser wires around her hand. (Video Recording.)  
5     Officer Pena deployed his taser a second time, which momentarily incapacitated Ms.  
6     Katzenjammer. (Pena Decl. ¶ 11.) Taser data shows that Officer Pena’s first taser cycle  
7     lasted five seconds, and the second taser deployment occurred immediately thereafter for  
8     another five seconds. (Starkovich Decl. ¶ 8.) The officers then physically restrained Mr.  
9     Young and Ms. Katzenjammer. (Video Recording.)

10               Before Plaintiffs were in handcuffs, Officer Travis Hauri arrived at the scene.  
11     (Hauri Decl. (Dkt. # 17) ¶ 5.) Officer Hauri began to subdue Ms. Katzenjammer, who  
12     was struggling and resisting the handcuffs. (*Id.*) Officers Sturlaugson and Pena then  
13     handcuffed Mr. Young as additional officers arrived on the scene. (Video Recording.)  
14     The entire incident in the apartment—from the officers’ arrival to both Plaintiffs being in  
15     handcuffs—lasted about four minutes. (*Id.*)

16               After Officer Sturlaugson walked Mr. Young out of the apartment to the patrol  
17     vehicle, Officer Pena asked Mr. Young to confirm the identity of “Daniel.” (*Id.*) During  
18     that conversation, Officer Pena explained that Mr. Young would have been able to stay in  
19     his apartment but “you rose up at me.” (*Id.*) Mr. Young was arrested for felony assault  
20     in the third degree for assaulting Officer Pena and transported to the Whatcom County  
21     Jail. (12/3/18 Sturlaugson Decl. ¶¶ 16-17; Pena Decl. ¶ 14.)

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1 Ms. Katzenjammer remained uncooperative, and eventually medics on the scene  
2 administered medication to sedate her. (Video Recording; Hauri Decl. ¶ 11.) Ms.  
3 Katzenjammer then fell asleep on the gurney and was taken to St. Joseph's Hospital for  
4 treatment. (*Id.*) Ms. Katzenjammer was never placed under arrest; nor was she  
5 transported to the Whatcom County Jail like Mr. Young. (Pena Decl. ¶ 19.)

6 Officer Hauri then went to the Emergency Department at St. Joseph Hospital with  
7 his supervisor, Sgt. David Johnson, to speak with Ms. Katzenjammer about the incident.  
8 (Johnson Decl. (Dkt. # 18) ¶ 11.) However, Officer Hauri and Sgt. Johnson found Ms.  
9 Katzenjammer "unconscious and unable to answer any questions about the incident."  
10 (*Id.*) According to Sgt. Johnson, "as part of the investigation, at the hospital Officer  
11 Hauri photographed the taser impact sites on Daniel Young's body." (*Id.*) According to  
12 Sgt. Johnson's Longarm Case Report:

13 Investigator Hauri and I went to the Emergency Department at St Joseph  
14 Hospital and located DANIEL YOUNG (C1) who was unconscious in one  
15 of the rooms. A nurse advised that the taser probes had already been  
16 removed from DANIEL YOUNG (C1), but she had noted that three taser  
17 probes that contacted his abdomen and one had contacted his thigh.  
Investigator Hauri photographed the possible locations where the probes had  
contacted DANIEL YOUNG (C1). DANIEL YOUNG (C1) was  
unconscious during this entire process and we were unable to ask him any  
questions.

18 (*Id.* ¶ 12, Ex. A ("Johnson Report") at 4.) Officer Hauri has a similar account of the  
19 hospital visit:

20 I then went to the hospital to continue the investigation. I arrived at the  
21 hospital to find that Daniel Young was unconscious. He was thus unable to  
be interviewed about the criminal incident. As part of the investigation, I  
photographed the taser impact sites on his body and a slight contusion on his  
22

1 right shoulder. I did not see any additional injuries. Daniel was left at the  
2 hospital and was not booked into jail.

3 (Hauri Decl. ¶ 13.)

4 Although neither party included the photographs in the record, it is undisputed that  
5 Officer Hauri photographed, at a minimum, Ms. Katzenjammer's abdomen, thigh, and  
6 right shoulder in a hospital room while she was the subject of an investigation but was  
7 not under arrest. (Johnson Decl. ¶ 11; Hauri Decl. ¶ 13; Compl. (Dkt. # 1) ¶ 3.37.) It is  
8 also undisputed that Ms. Katzenjammer was unconscious when the photographs were  
9 taken and could not consent to their occurrence. (*Id.*)

10 Ms. Katzenjammer was later charged with several misdemeanors, including  
11 assault in the fourth degree with sexual motivation, obstructing law enforcement, and  
12 resisting arrest. (Brady Decl. (Dkt. # 14) ¶ 4, Ex. B.) The criminal charges against both  
13 Plaintiffs were eventually dismissed under deferred prosecution agreements with the  
14 respective prosecutors' offices. (*Id.* ¶ 8, Ex. F.)

15 On July 1, 2018, Plaintiffs brought this lawsuit seeking damages from the  
16 Defendants for numerous state and federal claims. (*See generally* Compl.) On December  
17 3, 2018, Defendants filed a motion for summary judgment seeking dismissal of all of  
18 Plaintiffs' claims. (MSJ (Dkt. # 11).) Plaintiffs filed their response after receiving  
19 numerous extensions of time. (Resp. (Dkt. # 34); *see also* 4/15/19 Order (Dkt. # 33) at 2  
20 ("This is now Plaintiffs' fourth extension to respond to Defendants' pending summary  
21 judgment motion").) Defendants filed a reply. (Reply (Dkt. # 40).)

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1 On May 23, 2019, before the court ruled on Defendants' pending summary  
2 judgment motion, the court reassigned the matter to Magistrate Judge Michelle L.  
3 Peterson. (Min. Order (Dkt. # 46).) On June 18, 2019, Magistrate Judge Peterson held a  
4 hearing on Defendants' motion. (Min. Entry (Dkt. # 49).) Magistrate Judge Peterson  
5 issued a report and recommendation on June 28, 2019, granting in part and denying in  
6 part Defendants' motion. (*See R&R.*) On July 11, 2019, Defendants filed objections to  
7 Magistrate Judge Peterson's recommendations to deny summary judgment on (1) Ms.  
8 Katzenjammer's Fourth Amendment privacy claims, (2) Plaintiffs' *Monell*<sup>2</sup> claim, and  
9 (3) Plaintiffs' claim for outrage/intentional infliction of emotional distress. (*See*  
10 *generally Obj.*) Plaintiffs did not file objections to the report or recommendations or file  
11 a response to Defendants' objections. (*See Dkt.*) The court will address Defendants'  
12 objections in turn.

### III. ANALYSIS

14 | A. Legal Standards

15        “The district judge must determine de novo any part of the magistrate judge’s  
16 disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). “A judge of the  
17 court may accept, reject, or modify, in whole or in part, the findings or recommendations  
18 made by the magistrate judge.” 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3).  
19        The court reviews de novo those portions of the report and recommendation to which  
20 specific written objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121

<sup>2</sup> *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658 (1978).

1 (9th Cir. 2003) (en banc) (discussing 28 U.S.C. § 636(b)(1)). “The statute makes it clear  
2 that the district judge must review the magistrate judge’s findings and recommendations  
3 de novo if objection is made, but not otherwise.” *Id.* When no objections are filed, the  
4 court need not review de novo the report and recommendation. *Wang v. Masaitis*, 416  
5 F.3d 992, 1000 n.13 (9th Cir. 2005).

6 **B. Fourth Amendment Privacy Claim**

7 Defendants object to two portions of Magistrate Judge Peterson’s recommendation  
8 regarding Plaintiffs’ Fourth Amendment privacy claim. (*See Obj.* at 2-5.) First,  
9 Defendants assert that the report and recommendation relies on facts that are not in the  
10 record. (*Id.* at 2.) Specifically, Defendants argue that the report and recommendation  
11 improperly “‘presumed’ that Ms. Katzenjammer was naked when the officers  
12 photographed her injuries, the officers ‘manipulated’ her body to take photographs, and  
13 Ms. Katezenjammer [sic] was undergoing gender affirmation and that the officers  
14 therefore ‘likely’ performed a cross-gender observation.” (*Id.* (citing R&R at 30-31).)  
15 Defendants further assert that the only mention of nakedness in the record is inadmissible  
16 because it comes from Ms. Katzenjammer’s declaration and she was unconscious when  
17 Defendants took the photographs. (*Id.* at 3.) Second, Defendants argue that Magistrate  
18 Judge Peterson erred by not affording them qualified immunity. (*Id.* at 3-5.)

19 The court first concludes that the report and recommendation properly relied on  
20 matters in the record. Ms. Katzenjammer attests in her declaration, “[w]hile I was in the  
21 hospital and unconsciousness [sic], the Bellingham Police Department came and  
22 manipulated my naked body in order to take pictures.” (Katzenjammer Decl. (Dkt. # 36)

1 ¶ 106.) She further states, “I am an extremely private person. To have had pictures taken  
2 of me while I was unconscious – having been sedated on the recommendation of the  
3 police – is extremely humiliating.” (*Id.* ¶ 110.)

4 Defendants have never disputed that Ms. Katzenjammer was wearing only a  
5 hospital gown at the time the pictures were taken. (*See* Tr. (Dkt. # 51) at 7:24-8:5.)  
6 Further, Sgt. Johnson’s case report and Officer Hauri’s declaration reflect that they  
7 photographed the taser impact sites on Ms. Katzenjammer’s “abdomen” and “thigh,” as  
8 well as a “contusion on [her] right shoulder.” (Johnson Report at 4; Hauri Decl. ¶ 13.)  
9 Officer Hauri also appears to have inspected the rest of Ms. Katzenjammer’s body,  
10 stating, “I did not see any additional injuries.” (*Id.*)

11 Viewing the evidence in the light most favorable to Plaintiffs, the report and  
12 recommendation correctly “presumes” that, to photograph Ms. Katzenjammer’s lower  
13 abdomen, the officers needed to move Ms. Katzenjammer’s hospital gown to expose her  
14 abdomen and thigh. (R&R at 30.) This likely exposed her genitals. The report and  
15 recommendation also correctly finds that the officers may have needed to manipulate Ms.  
16 Katzenjammer’s unconscious body to search for and photograph the injuries. (*Id.* at 31.)

17 Plaintiffs’ counsel explained at oral argument that Plaintiffs are not arguing that  
18 Ms. Katzenjammer was entirely naked, but that the officers necessarily lifted or moved  
19 her gown in a way that exposed her genitals. (Tr. at 12:14-13:21.) Defense counsel did  
20 not make any argument to the contrary, agreeing that Ms. Katzenjammer “was wearing a  
21 hospital gown,” but arguing there was no evidence the officers “removed any clothes  
22 from her.” (*Id.* at 8:24-9:5.) The report and recommendation recognized the distinction

1      in Plaintiffs' argument, as well as Defendants' counterargument, and viewed the evidence  
2      correctly at the summary judgment stage.

3                 Moving to Defendants' argument regarding qualified immunity: Police officers  
4      "generally are shielded from liability for civil damages insofar as their conduct does not  
5      violate clearly established statutory or constitutional rights of which a reasonable person  
6      would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining  
7      whether a police officer is entitled to qualified immunity, the court must decide: (1)  
8      whether the facts that the plaintiff alleges assert a violation of a constitutional right; and  
9      (2) whether the right at issue was "clearly established" at the time the defendant engaged  
10     in the misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (discussing *Saucier v.*  
11     *Katz*, 533 U.S. 194, 201 (2001)). To determine whether a right was clearly established,  
12     "the standard is one of fair warning: where the contours of the right have been defined  
13     with sufficient specificity that a state official had fair warning that [his] conduct deprived  
14     a victim of his rights, [he] is not entitled to qualified immunity." *Serrano v. Francis*, 345  
15     F.3d 1071, 1077 (9th Cir. 2003) (quotation marks and citation omitted). "This is not to  
16     say that an official action is protected by qualified immunity unless the very action in  
17     question has previously been held unlawful; but it is to say that in the light of pre-existing  
18     law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640  
19     (1987) (internal citations omitted); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("We  
20     do not require a case directly on point, but existing precedent must have placed the  
21     statutory or constitutional question beyond debate."). Where a "genuine issue of material  
22     fact exists that prevents a determination of qualified immunity at summary judgment, the

1 case must proceed to trial.” *Bonivert v. Clarkson*, 883 F.3d 865, 871-72 (9th Cir. 2017).  
2 Courts may consider the two prongs of the qualified immunity analysis in any order. *See*  
3 *Chism v. Washington*, 661 F.3d 380, 386 (9th Cir. 2011).

4 “The overriding function of the Fourth Amendment is to protect personal privacy  
5 and dignity against unwarranted intrusion by the State.” *Schmerber v. California*, 384  
6 U.S. 757, 767 (1966). “[T]he Fourth Amendment’s proper function is to constrain, not  
7 against all intrusions as such, but against intrusions which are not justified in the  
8 circumstances, or which are made in an improper manner.” *Id.* at 768. “The touchstone  
9 of the Fourth Amendment is reasonableness, and the reasonableness of a search is  
10 determined ‘by assessing, on the one hand, the degree to which it intrudes upon an  
11 individual’s privacy and, on the other, the degree to which it is needed for the promotion  
12 of legitimate governmental interests.’” *United States v. Knights*, 534 U.S. 112, 118-19  
13 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

14 Magistrate Judge Peterson reviewed the photographing of Ms. Katzenjammer  
15 under the test established in *Bell v. Wolfish*, 441 U.S. 520, 529 (1979). (*See* R&R at 28.)  
16 Under the *Bell* framework, the court considers: (1) the scope of the intrusion; (2) the  
17 manner in which the search was conducted; (3) the justification for initiating the search;  
18 and (4) the place in which the search was conducted. *See Bell*, 441 U.S. at 559; *see also*  
19 *Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (applying the  
20 *Bell* framework).

21 The Ninth Circuit has long recognized that “[t]he desire to shield one’s unclothed  
22 figure from [the] view of strangers, and particularly strangers of the opposite sex, is

1 impelled by elementary self-respect and personal dignity.” *York v. Story*, 324 F.2d 450,  
2 455 (9th Cir. 1963). Further, although the Ninth Circuit has not articulated a clear  
3 standard for when a police officer may view an individual’s naked body, other circuits  
4 have recognized that a search involving “movement of clothing to facilitate the visual  
5 inspection of a [person’s] naked body . . . qualifies as a type of sexually invasive search.”  
6 *Sims v. Labowitz*, 885 F.3d 254, 260-61 (4th Cir. 2018) (internal quotations and citation  
7 omitted). These sexually invasive searches constitute “an extreme intrusion upon  
8 personal privacy, as well as an offense to the dignity of the individual.” *Id.* (quoting  
9 *Wood v. Clemons*, 89 F.3d 922, 929 (1st Cir. 1996)). Moreover, as both parties admit,  
10 courts have not articulated the circumstances under which a search of the exposed body  
11 of a private person—as opposed to the body of a prisoner or detainee—is reasonable.  
12 Suffice it to say, the privacy interests of a private person in a hospital bed are not  
13 diminished in the way they are for convicted prisoners and pretrial detainees, in part  
14 because there are no “considerations of internal security within [a] corrections facilit[y].”  
15 See, e.g., *Bell*, 441 U.S. at 545-48.

16 Under the reasons articulated in cases involving prisoners and detainees, the court  
17 concludes that Defendants are not entitled to qualified immunity on Plaintiffs’ Fourth  
18 Amendment privacy claim. The Ninth Circuit has emphasized that strip-searching  
19 arrestees must be weighed against the legitimate security concerns of the detention  
20 facility. *See Bull v. City & Cty. of S.F.*, 595 F.3d 964, 981 (9th Cir. 2010) (collecting  
21 cases). Therefore, a blanket policy of strip-searching arrestees that will not enter the  
22 general prison population is unconstitutional because it is not “reasonably related to the

1 [detention facility's] interest in maintaining security.” *Way v. Cty. of Ventura*, 445 F.3d  
2 1157, 1161 (citation omitted); *see Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir.  
3 1991) (same). Rather, these searches must be justified under different principles, such as  
4 incident to an arrest, *see United States v. Robinson*, 414 U.S. 218, 235 (1973), or exigent  
5 circumstances, *see Schmerber*, 384 U.S. at 771-72; *see also Bull*, 595 F.3d at 981.

6 Defendants take issue with report and recommendation relying on cases that  
7 involve inmates, arrestees, and parolees, arguing that these cases arise in a different  
8 context and are therefore not applicable to Ms. Katzenjammer. (*See Obj.* at 4-5.) If  
9 anything, reliance on these different contexts favors Defendants—as explained, the cases  
10 involve populations with lesser privacy expectations than Ms. Katzenjammer.  
11 Consequently, considering that the Ninth Circuit has determined that a blanket  
12 strip-search policy is unconstitutional unless the person will enter the general prison  
13 population or a separate principle justifies the search, it is all-the-more clearly established  
14 that such a search is unconstitutional when conducted on a person with undiminished  
15 privacy rights, such as Ms. Katzenjammer.

16 Defendants do not cite any special circumstance that allowed them to photograph  
17 unclothed and sensitive parts of Ms. Katzenjammer’s body, nor does the court find any.  
18 (*See Obj.*) To the extent Defendants were conducting an investigation, Defendants did  
19 not have a “legitimate” concern that the taser marks on Ms. Katzenjammer would  
20 disappear before she awoke and they could ask her consent. *Cf. Schmerber*, 384 U.S. at  
21 771-72 (finding that officer could order a warrantless blood draw to determine

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1 petitioner's blood-alcohol level, where waiting for a warrant threatened a "destruction of  
2 the evidence").

3 The court therefore DENIES Defendants' motion for summary judgment on  
4 Plaintiffs' Fourth Amendment privacy claim.

5 **C. *Monell* Claim**

6 Defendants object to Magistrate Judge Peterson's recommendation to deny them  
7 summary judgment on Plaintiffs' *Monell* claim. (See Obj. at 5-6.) Magistrate Judge  
8 Peterson based this recommendation on a finding that, at the hearing, Defendants'  
9 counsel admitted that it was the Bellingham "police department's policy to document all  
10 injuries stemming from officers' use of force" and that, "[g]iven the early stage of this  
11 litigation . . . Plaintiffs should have an opportunity to conduct further discovery  
12 regarding" the policy. (R&R at 40-41.)

13 Under *Monell*, municipalities can be liable for deprivation of constitutional rights  
14 when the deprivation occurs pursuant to "(1) an official policy; (2) a pervasive practice or  
15 custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final  
16 policymaker." *Horton by Horton v. City of Santa Monica*, 915 F.3d 592, 602-03 (9th Cir.  
17 2019) (discussing *Monell*, 436 U.S. at 690-95). However, a municipality may not be  
18 sued under a theory of *respondeat superior*. *Monell*, 436 U.S. at 693-95. A plaintiff  
19 must show that a "deliberate action attributable to the municipality itself [is] . . . the  
20 moving force behind the plaintiff's deprivation of federal rights." *Bd. of Cty. Comm'r's of*  
21 *Bryan Cty. Okla. v. Brown*, 520 U.S. 397, 400 (1997) (quoting *Monell*, 436 U.S. at 694)  
22 (internal quotations omitted). Thus, to prove a *Monell* claim, the plaintiff must (1)

1 identify a custom or policy that is attributable to the municipality and that caused his  
2 injury; and (2) demonstrate that the custom or policy was adhered to with “deliberate  
3 indifference” to his rights. *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1076 (9th Cir. 2016.)

4 Defendants raise a number of issues with the report and recommendation. (See  
5 Obj. at 5-6.) The court addresses three.

6 First, Defendants argue that Plaintiffs have not even pleaded *Monell* liability  
7 arising out of the Defendants’ taking pictures of Ms. Katzenjammer at the hospital. The  
8 court agrees. Plaintiffs’ claim regarding *Monell* liability centers exclusively on racial  
9 profiling. (See Compl. ¶¶ 5.6-5.13.) Plaintiffs’ complaint makes no mention of the  
10 photographs, such as it does with respect to their 42 U.S.C. § 1983 claim against the  
11 individual officers. (See *id.* ¶ 5.2(i).) At most, Plaintiffs make a passing reference at the  
12 Fourth Amendment in their *Monell* claim (alongside references to the “First, . . . Fifth,  
13 Eighth, and Fourteenth Amendments to the U.S. Constitution, and rights under the  
14 Washington State Constitution”), but that alone does not incorporate the photograph  
15 allegations. (*Id.* ¶ 5.7.) Thus, although Defendants were denied summary judgment on  
16 Plaintiffs’ Fourth Amendment privacy violations, this does not provide a basis for  
17 maintaining Plaintiffs’ *Monell* claim.

18 Second, even if the *Monell* claim incorporated the disputed photographs, Plaintiffs  
19 have not identified any facts from which a reasonable fact finder could reasonably find  
20 that the police department had a policy or custom to take photographs in a manner that  
21 violated Ms. Katzenjammer’s privacy rights. See *Celotex Corp. v. Catrett*, 477 U.S. 317,  
22 324 (1986). Although Defendants’ counsel represented at the hearing that it is the

1 department's policy "to document injuries after a use of force, and certainly in an  
2 application of a Taser," counsel also clarified, "I can't stand here and say it's protocol  
3 you have to go to the hospital" to document the injuries. (Tr. at 7:8:15.) Simply,  
4 Plaintiffs have not raised a genuine dispute of material fact that there is such a policy.  
5 (See generally Compl.; Resp.)

6 Finally, Magistrate Judge Peterson agreed that there is not currently evidence in  
7 the record that shows the police department has such a policy but denied summary  
8 judgment nevertheless because of "the early stage of this litigation." (R&R at 40.) This  
9 case, however, is not at an early stage. Plaintiffs filed their complaint in July 2018. (See  
10 Compl.) Discovery closes on September 16, 2019—in less than two months. (See Sched.  
11 Order. (Dkt. # 10) at 1.) Although Defendants filed their summary judgment motion on  
12 December 3, 2018 (see MSJ), which is well before the October 15, 2019, dispositive  
13 motions deadline (see Sched. Order at 1), Plaintiffs received four extensions and over  
14 four months to respond, see supra II. Although Plaintiffs complain that discovery had  
15 not yet commenced when Defendants filed their motion (see Resp. at 3), Plaintiffs make  
16 no representation that they have sought discovery in the year this case has been pending  
17 (see id.). Further, Plaintiffs have an avenue for relief if they do not have sufficient facts  
18 to respond to a summary judgment motion: Federal Rule of Civil Procedure 56(d)  
19 applies to this exact situation. Plaintiffs have not sought relief under this rule. (See Dkt.)

20 For the foregoing reasons, the court GRANTS Defendants' summary judgment on  
21 Plaintiffs' *Monell* claim.

22 //

1      **D. Intentional Infliction of Emotional Distress/Outrage**

2           Defendants object to Magistrate Judge Peterson's recommendation to deny them  
3 summary judgment on Plaintiffs' claim for intentional infliction of emotional  
4 distress/outrage. (Obj. at 7.) Magistrate Judge Peterson recommended that whether  
5 Defendants' pictures of Ms. Katzenjammer satisfy this claim involves genuine disputes of  
6 material fact that are inappropriate for summary judgment. (R&R at 43-44.)

7           The tort of outrage, also known as intentional infliction of emotional distress,  
8 "requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or  
9 reckless infliction of emotional distress, and (3) actual result to plaintiff of severe  
10 emotional distress." *Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003). "Any claim of  
11 outrage must be predicated on behavior so outrageous in character, and so extreme in  
12 degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious,  
13 and utterly intolerable in a civilized community." *Strong v. Terrell*, 195 P.3d 977, 982  
14 (Wash. Ct. App. 2008) (internal quotation marks and citations omitted).

15           "The elements of outrage generally are factual questions for the jury." *Sutton v.*  
16 *Tacoma Sch. Dist. No. 10*, 324 P.3d 763, 768 (Wash. Ct. App. 2014). "However, a trial  
17 court faced with a summary judgment motion must make an initial determination as to  
18 whether the conduct may reasonably be regarded as so 'extreme and outrageous' as to  
19 warrant a factual determination by the jury." *Id.* (internal quotation marks and citations  
20 omitted). A court may consider several factors, including:

21           (1) the position the defendant occupied, (2) whether the plaintiff was  
22 particularly susceptible to emotional distress and the defendant was aware of  
the susceptibility, (3) whether the defendant's conduct was privileged, (4)

1           whether the degree of emotional distress was severe as opposed to merely  
2 annoying, inconvenient or embarrassing, and (5) whether the defendant was  
3 aware of a high probability that his or her conduct would cause severe  
4 emotional distress, and consciously disregarded that probability.

5 *Id.* at 768-69.

6           Defendants argue that the report and recommendation errs because, similar to their  
7 arguments above, it relies on facts that are not in the record, *see supra* § III.B, and the  
8 facts that are properly in the record do not support an outrage claim (*see* Obj. at 7).

9           As the court discussed above, Defendants' argument regarding the facts in the  
10 record is without merit. *See supra* § II.B. The report and recommendation appropriately  
11 viewed the evidence in the light most favorable to Plaintiffs. In this light, and based on  
12 the record, the court concludes that Defendants' conduct in photographing Ms.  
13 Katzenjammer "may reasonably be regarded as so 'extreme and outrageous' as to warrant  
14 a factual determination by the jury." *Sutton*, 324 P.3d 768. The court therefore DENIES  
15 Defendants' motion for summary judgment on this claim.

#### 16                          **IV. CONCLUSION**

17           For the foregoing reasons, the court ORDERS as follows:

18           (1) The court ADOPTS in part and REJECTS in part the R&R (Dkt. # 50);

19           (2) The court GRANTS in part and DENIES in part Defendants' motion for  
20 summary judgment (Dkt. # 11);  
21  
22 //

1                   (3) The court DIRECTS the Clerk to send copies of this order to the parties and to  
2                   Magistrate Judge Peterson.

3                   Dated this 6th day of August, 2019.

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JAMES L. ROBART

United States District Judge

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